STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company **Petition for Approval of the Energy Efficiency and Demand-Response Plan pursuant to Section 12-103(f) of the Public Utilities Act**	: : : : : :	**Docket No. 07-0540**

BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

JOHN C. FEELEY
CARMEN L. FOSCO
ARSHIA JAVAHERIAN
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jfeeley@icc.illinois.gov
cfosco@icc.illinois.gov
javahera@icc.illinois.gov

Counsel for the Staff of the Illinois Commerce Commission

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Table of Contents

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Commonwealth Edison Company	:	
	:	
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STAFF OF THE ILLINOIS COMMERCE COMMISSION

Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.830 of the Rules of Practice (83 Ill. Adm. Code 200.800) of the Illinois Commerce Commission's ("Commission"), respectfully submits its Brief on Exceptions to the Proposed Order ("Proposed Order" or "PO") issued by the Administrative Law Judges ("ALJs") on January 25, 2008 in the above-captioned matter.

I. INTRODUCTION

Commonwealth Edison Company (the "Company" or "ComEd") and the Illinois Department of Economic Opportunity ("DCEO") filed an Energy Efficiency and Demand Response Plan ("EE-DR") in accordance with Section 12-103 of the Public Utilities Act (the "Act"). (220 ILCS 5-12-103) On January 25, 2008, the Administrative Law Judge ("ALJ") issued a Proposed Order ("PO") setting out a ruling on the Company's EE-DR plan. Although Staff supports most of the PO, there are items to which Staff takes exception as set forth below.

II. EXCEPTIONS

A. The Commission should approve a single charge cost recovery from all customers.

The PO's conclusion concerning the appropriate recovery mechanism for energy efficiency and demand response costs under the proposed rider is contrary to the record, inconsistent with the statutory provisions giving rise to those costs, and should be reversed.

The PO accepts the IIEC's proposal that there be separate recovery mechanisms for customer classes because the costs will be expended on an unequal basis. This is in contrast to the proposal by Staff and the Company that a uniform per-kWh charge be applied to all customers.

The PO supports its conclusion by stating that "While we acknowledge that all consumers will benefit equally from imposition of the statute, as it attempts to confer cleaner air, less peak demand, and less of a need for new generation and other costs in an equal manner, the IIEC's approach is more in conformance with traditional rate-making principles that are enunciated in the Public Utilities Act." (PO, pp. 37-38) The PO specifically cites to the following language in Section 9-241 of the Act:

> No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable differences as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(PO, p. 38; 220 ILCS 5/9-241)

The problem with the PO's conclusion is self-evident. The PO acknowledges that all consumers will benefit equally from the proposed program, but nevertheless

concludes that consumers should pay unequally for that equal benefit. The group of customers that will pay less, which presumably include IIEC members, will receive the same benefits as smaller residential customers who will be required to pay more on a per-kWh basis.

Since, as the PO acknowledges, the benefits are indeed equal, it is not clear how "any preference or advantage" will result if costs are recovered from all customers on an equal per-kWh basis. Nor, does it appear possible that the proposed equal per-kWh charge would produce "any unreasonable differences" -- especially when the PO states that the benefits would be equal.

As noted in the Post-Hearing Brief of the Staff of the Illinois Commerce Commission ("Staff Br."), ComEd's proposal to recover costs for energy efficiency and demand-response measures pursuant to a single per-kilowatt-hour ("kWh") charge is also consistent with and supported by the Act in several key respects. (Staff Br., pp. 42-43) Subsection (d) of Section 12-103 establishes spending screens for the implementation limitations applicable to electric utilities based on amounts paid by all retail customer. 220 ILCS 5/12-103(d). A single per-kWh charge for all retail customers is consistent with the use of amounts paid by all retail customers to establish the spending limits that trigger the obligation to reduce the implementation of measures. The PO's adoption of IIEC's proposal undermines the clear legislative intent to limit the bill impacts for all customers by creating a gross mismatch between the spending limits (which are based on a specified percentage of charges for all retail customers) and class-based cost recovery of energy-efficiency and demand response measures (that will impose costs above the spending limits prescribed in the Act on certain classes).

Similarly, the establishment of a requirement to implement energy efficiency and demand-response measures was premised on the legislative finding that such "measures will reduce direct and indirect costs to consumers by decreasing environmental impacts and by avoiding or delaying the need for new generation, transmission, and distribution infrastructure." (220 ILCS 5/12-103(a)) Since new Section 12-103 is premised on environmental and other benefits equally applicable to all customers, it is appropriate to recover the costs of such programs based on a single uniform charge to all customers.

Finally, at least one other public utility commission has considered issues similar to those presented here, and concluded that a cross subsidy (as asserted by IIEC and BOMA) does not occur simply because the one customer group may acquire more conservation measures than another customer group because there is a benefit to all from implementing such measures:

> We also do not agree with the apparent argument that a cross subsidy occurs simply because the conservation tariff rider applies to all customers, but all customers may not equally share in the conservation acquired through the rider. The tariff rider creates a public benefit by providing a pool of funds to acquire the most conservation at the least cost, wherever that may occur.

(*In re Avista Corporation*, 2007 Wash. UTC LEXIS 55, 18 (Feb. 1, 2007))

In sum, the only reasonable charge to support the PO's acknowledgement of "equal benefits" would be an equal per-kWh rate charged to all customers. The Commission should reverse the PO's conclusion on this issue and accept the equal per-kWh charge proposed by Staff and the Company.

Based on the forgoing argument, pages 37-38 of the PO should be revised accordingly:

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9. Single-Charge Cost Recovery from all Customers

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Analysis and Conclusions

W~~hile we~~ acknowledge that all consumers will benefit equally from imposition of the statute, as it attempts to confer cleaner air, less peak demand, and less of a need for new generation and other costs in an equal manner. Furthermore, we note that the proposed equal per-kWh charge proposed by Staff and the Company are consistent with this assumption of equal benefits. Therefore, we adopt the equal per-kWh charge for the rider. This ~~, the IIEC's approach~~ is ~~more~~ in conformance with traditional rate-making principles that are enunciated in the Public Utilities Act. Specifically, Section 9-241 provides, in pertinent part that:

> No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable differences as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(220 ILCS 5/9-241).

We further note that the recovery mechanisms proposed by both IIEC and BOMA are problematic. The IIEC's approach is unreasonable because it would recover costs on an unequal basis even though we found the benefits to be equal. Moreover, as pointed out by Staff, the Legislature similarly found that energy-efficiency and demand response measure provide benefits to all customers. Finally, the proposals by IIEC and BOMA would result in charges that are not consistent with the Act's use of a spending cap to limit bill impacts based on amounts paid by all retail customers. ~~is also not unduly complicated. Additionally, it only re-distributes the funds that have been collected; it does not reduce the amount of funds that a utility will be able to use. This approach is reasonable and it should be adopted~~.

The BOMA proposal is problematic for other reasons as well. ~~However,~~ BOMA's construction of Section 12-103(d) of the Act is erroneous. It does limit the amount of energy efficiency and demand response measures, as BOMA contends, but, it does so in a uniform manner to all. It is a "cap." For example, with regard to the first year of energy efficiency and demand response, it provides:

> Notwithstanding the requirements of subsections (b) and (c) of this Section, an electric utility shall reduce the amount of energy efficiency and demand-response measures implemented in any single year by an amount necessary to limit the estimated average increases in the amounts paid by retail customers in connection with electric service due to the cost of these measures to . . . in 2008, no more than 0.5% of the amount paid per kilowatthour by those customers during the year ending May 31, 2007.

(220 ILCS 5/12-103(d) and (d)(1)). (Emphasis added). It limits what can be imposed on consumers, but, it makes that limitation in a uniform manner to be applied to all consumers. This portion of the statute does not aid BOMA.

~~Unlike the IIEC's simple, straightforward approach which merely creates three broad customer classes,~~ BOMA seeks to impose 15 different rates for 15 different classes. Due to the brevity of time afforded by the General Assembly, it is not possible to determine whether BOMA's approach is a reasonable one.

We also note that necessarily, dividing the charge amongst 15 customer classes in the manner described by BOMA would require the expenditure of some time and money, unnecessarily, thereby diverting some efforts from the achievement of the statutory goals. We decline to adopt BOMA's recommendations on this issue.

Constellation New Energy's proposal appears to be that, essentially, a utility should be required to determine which customers of alternative electric suppliers are participating in demand response or energy efficiency programs offered by an alternative electric supplier, and then exclude these persons or entities from the charge imposed for energy efficiency and demand response, or, offer those persons or entities a discount. However, there is no evidence indicating what such a process would entail, or, if it is even feasible. We therefore decline to follow this recommendation.

B. The Commission's final Order should address the issue that Rider EDA's August 28, 2007 limitation of costs date applies to all incremental costs incurred by the Company not just legal and consultative costs.

While the PO includes a discussion that the costs to be recovered through Rider EDA are limited to the incremental costs incurred by ComEd, it does not address Rider EDA's limitation of costs date of August 28, 2007 in particular the issue that the date

applies to all incremental costs incurred by the Company not just legal and consultative costs. The Company addressed this issue in the rebuttal testimony of Mr. Paul Crumrine. Mr. Crumrine stated that was always the intent of the Company's tariff language, but that ComEd would revise the definition of incremental costs in Rider EDA to make that intent clearer. ComEd Ex. 10.0 at 12. Staff recommends that the PO be revised so that it is clear that Rider EDA's limitation of costs date of August 28, 2007 applies to all incremental costs not just legal and consultative costs.

Recommended Language:
(PO at 23-24)

* * *

Q. Recovery of Incremental Costs

ComEd asserts that Rider EDA includes those costs necessary to implement ComEd's and DCEO's programs, including, but not limited to, third-party administrative costs, customer incentives, internal management activities (*e.g.*, marketing, advertising, reporting, risk analysis) and incremental fully-loaded labor costs (*i.e.*, costs related to the creation of new positions and hiring of new employees who have been retained to work on the energy efficiency portfolio and that are not recovered through other tariffed charges such as delivery charges). (ComEd Ex. 2.0. at 49-50).

* * *

Mr. Crumrine averred that the definition of "Incremental Costs" provides for the amortization of certain costs, such as consultative and legal costs related to the development and Commission approval of plans, over a three-year period. (ComEd Ex. 5.0 at 8). He testified that the definition of "Incremental Costs" also provides for the recovery of the revenue requirement equivalent for capital investments, including a return of and on such investments. (*Id*). Such ratemaking treatment initially will be limited to direct load control devices and installation labor associated with the proposed expansion of ComEd's existing residential demand response program, Rider AC7. (ComEd Ex. 3.0 at 7). Later, such treatment may be expanded to include other capital investments under future three-year plans filed by ComEd. Similar to other investments in capital assets, this spreads the cost recovery of such long-lived capital assets over their useful lives. (ComEd Ex. 5.0 at 8). In his rebuttal testimony Mr. Crumrine addressed Staff witness Pearce's concern that Rider EDA's tariff language was not

clear regarding whether the August 28, 2007 limitation of costs date applied only to legal and consultative costs or all other incremental costs as well. Mr. Crumrine testified that ComEd's intent is to limit cost recovery through Rider EDA to all incremental costs incurred after the effective date of Public Act 95-0481. Mr. Crumrine indicated that the Company would revise Rider EDA to be consistent with that intent. (ComEd Ex. 11.0 at 12)

C. The Commission should not approve "Banking" Energy Savings and Excess Expenditures

1. Excess energy savings was foreseen by the legislature, but banking savings is not allowed

While the PO agrees with Staff that "banking" is inconsistent with the requirement in the Act to reduce the measures implemented in any single year to keep estimated increases below the spending screen set forth in subsection (d) of Section 12-103, it reaches a conclusion inconsistent with that construction. Thus, Staff takes exception to the PO's conclusion to allow a limited amount of banking. (PO at 40) Staff argued in its Initial Brief that the plain language of the statute does not allow for a carry over of any energy savings. (Staff Br. at 51) Staff noted that the utilities are directed to "implement energy efficiency measures to meet the *incremental annual* goals, with incremental given its plain meaning, *in addition to*. Thus, each year's goals are *in addition to* achievement[s] of the previous year's goals." (*Id*.) Therefore, it was expected by the legislature that each year would build upon the previous year. If a utility banks any energy savings, they are contravening this plain language. Any banking reduces the amount that would otherwise be saved *in addition to* the previous year's savings. Thus, it is clear that the legislature did foresee an energy savings overrun, but expected the utilities to continue to build upon the previous years savings. In essence excess savings is a good result.

However, the issue of "banking" is separate from the issue of cost recovery. Staff believes that Section 12-103(d) imposes a clear and unambiguous requirement to "**reduce** the amount of energy efficiency and demand-response measures implemented in any single year" by an amount necessary to limit the "**estimated average increase** in the amounts paid by retail customers in connection with … such measures" to certain prescribed levels. 220 ILCS 5/12-103(d) (emphasis added). (*see* Staff br. at 50-51) This requirement should keep actual costs at or near the spending screen, but was not designed to achieve a perfect match or cap as evidenced by the reference to "estimated average increase" instead of actual increase. Thus, Staff contends that the Act requires an electric utility to reduce its implementation of measures to keep the **estimated increase** from going over the spending screen, but does not prohibit recovery of actual costs that exceed the spending screen if a utility's actions to reduce the implementation of measures and actual costs were reasonable. .

2. A *de minimis* amount is no more than a "trifle."

A *de minimis* amount is an insignificant amount.[1] Furthermore, the United States Supreme Court has held that all legislative statutes are subject to the law of *de minimis non curat lex* which means:

> 'the law cares not for trifles' [and] is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. See, e. g., Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (1992); Hudson v. McMillian, 503 U.S. 1, 8-9, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992); Ingraham v. Wright, 430 U.S. 651, 674,

[1] "De minimis", according to the Merriam Webster on-line dictionary, means lacking significance or importance : so minor as to merit disregard. (http://www.m-w.com/dictionary/de%20minimis visited 2/1/2008)

51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 18, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976); Industrial Assn. of San Francisco v. United States, 268 U.S. 64, 84, 69 L. Ed. 849, 45 S. Ct. 403 (1925).

Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (U.S. 1992)

Online and print legal dictionaries define *de minimis* as, "Latin for 'of minimum importance' or 'trifling.' Essentially it refers to something or a difference that is so little, small, minuscule or tiny that the law does not refer to it and will not consider it. In a million dollar deal, a $10 mistake is de minimis." <http://dictionary.law.com/default2.asp?selected=484&bold=%7C%7C%7C%7C> last visited January 31, 2008) By that example a *de minimis* amount is .001%--one one-hundredths of a percent.

ComEd witness Paul Crumrine testified that the projected spending limits for ComEd's EE-DR plans are $39.4 million in year one, $81.6 million in year two, and $126.7 million in year three. (ComEd Ex. 5.0, p. 16) The PO would allow a carry over of $3.9M in year one, $8.1M in year two, and $12.6M in year three. Staff contends that those amounts are not insignificant or just a mere trifle, but rather significant, and should be accounted for accordingly.

Staff believes that the intent of a *de minimis* carry over or cost overrun was misunderstood by the PO to be part of Staff's understanding of Section 12-103(d). Section 12-103(d) allows for the recovery of costs above the spending screens if reasonable reductions to the implementation of measures are made as was discussed previously. Staff does not propose that any limit be set for what will be considered *de*

minimis as it will most likely be dictated by the facts, and 10% would be more than de minimis.

Recommended Language:

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9. "Banking" Energy Savings and Excess Expenditures

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Analysis and Conclusions

With regard to "banking" energy savings, we agree with Staff's construction of the statute. For example, in the first year of its implementation, the statute requires that:

> Notwithstanding the requirements of subsections (b) and (c) of this Section an electric utility shall reduce the amount of energy efficiency and demand-response measures implemented in any single year by an amount necessary to limit the estimated average increases in the amounts paid by retail customers in connection with electric service due to the cost of these measures to . . in 2008, no more than 0.5% of the amount paid per kilowatthour by those customers during the year ending May 31, 2007.

(220 ILCS 5/12-103(d) and (d)(1)). (Emphasis added). The plain language in the statute does not allow utilities or DCEO to "carry over" excess energy savings or costs. However, if the utility takes reasonable steps to "reduce the amount of energy efficiency and demand-response measures implemented in any single year" by an amount necessary to limit the "estimated average increase in the amounts paid by retail customers in connection with … such measures" to certain prescribed levels, then costs that exceed the spending screen may be recoverable. 220 ILCS 5/12-103(d). Therefore, there would be no need to carry over or bank any energy savings as the costs for the excess savings may be recoverable The Commission is also encouraged

that this will allow for the utilities to maintain a hands on approach as the programs ramp up.~~However, it seems to be inevitable that some de minimus "carry over" of energy savings would have to occur. It also appears to be likely that the General Assembly would have been aware of that fact when drafting the statute. It is quite possible that the General Assembly chose the language in question to avoid one of the situations mentioned by Staff, that, a utility could "bank" energy savings in such a manner as to render its program in a "banked" year to be an ineffectually slight amount, or, even non-existent.~~

~~We note that DCEO's approach strikes a balance between the concerns expressed by ComEd, that it may not know when it reaches the statutory goal, and that expressed by Staff which is, essentially, that utilities should not be provided with a motivation to decrease spending on energy efficiency programs in the "banked" year(s). Limiting the amount of allowable "banked energy savings" to a percentage of the banked year's energy savings is reasonable. It is also reasonable to limit the amount that can be "banked" to one which would only allow utilities to "bank" a de minimus carry over, as anything further would violate the statute. Therefore, ComEd's request for Commission approval of "banked" energy savings is granted, but, it may "bank" no more than 10 percent of the energy savings required by statute in the year, in which, it is "banked."~~

With regard to ComEd's request to "bank" any cost overrun from a previous year, we note that, as Staff has pointed out, "banking" energy savings is not the same as allowing a utility to recover plan costs that are in excess of the statutory spending requirements. ~~In such an instance, there must be something for those costs to offset,~~

~~which, in this case, is excess energy efficiency or demand response savings.~~ We agree with ComEd that there may be situations, in which, it would be inevitable that de minimus cost overruns would occur. Thus, cost overruns of a *de minimis* nature are recoverable. We do not now set any limits to what is a *de minimis* amount as it will most likely be dictated by the facts of the situtation.~~Such a cost overrun, however, may only be used to offset excess energy efficiency savings or demand response savings. Moreover, it, too, must be in a de minimus amount, no more than 10 percent of the costs required by statute in the year, in which, it is "carried over."~~

III. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be approved in this proceeding.

Respectfully submitted,

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JOHN C. FEELEY
CARMEN L. FOSCO
ARSHIA JAVAHERIAN
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jfeeley@icc.illinois.gov
cfosco@icc.illinois.gov
javahera@icc.illinois.gov

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